Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1993

CENTRAL DISTRIBUTORS OF BEER, INC.,

Petitioner,

v.

DONALD CONN, GLORIA CONN, JOHN NATE BEVERAGE, INC., AND JOHN NATE, JR.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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Dated: April 25, 1994

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44pp

QUESTIONS PRESENTED

I. TO VIOLATE THE WIRE FRAUD OR MAIL FRAUD STATUTES, MUST A FRAUDULENT MISREPRESENTATION BE MADE DIRECTLY BY THE DEFENDANT TO THE PERSON DEFRAUDED, EVEN WHEN INTERSTATE TELEPHONE CALLS WERE MADE BY THE DEFENDANT TO A THIRD PARTY IN FURTHERANCE OF THE SCHEME TO DEFRAUD?

Petitioner answers "No."

The Sixth Circuit answered "Yes."

Seven other Circuit Courts have addressed this issue. Four Circuits (the First, Eighth, Ninth and Tenth Circuits) answered "No". Two Circuits (the First and Fourth Circuits) answered "Yes". The Second Circuit is split on this issue.

II. DO THE ELEMENTS OF WIRE FRAUD OR MAIL FRAUD DIFFER DEPENDING UPON WHETHER THE CASE IS (A) A CRIMINAL PROSECUTION OR (B) A CIVIL CASE UNDER THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT ("RICO"), 18 U.S.C. § 1961 *ET SEQ.*, IN WHICH WIRE FRAUD OR MAIL FRAUD IS ALLEGED AS A PREDICATE OFFENSE?

Petitioner answers "No".

The Sixth Circuit effectively answered "Yes", in conflict with this Court's decision is *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479, 87 L.Ed.2d 346, 105 S. Ct. 3275 (1985).

LIST OF PARTIES AND CORPORATE AFFILIATES

In the proceedings below, Plaintiff was Central Distributors of Beer, Inc., a Michigan corporation. Defendants were Donald Conn, an individual, Gloria Conn, an individual, John Nate Beverage, Inc., a Michigan corporation (now known as Bud Distributing, Inc.), and John Nate, Jr., an individual, jointly and severally. They are all also parties to the proceeding in this Court, and there are no additional parties.

Central Distributors of Beer, Inc. is a privately-held corporation with no subsidiaries that are not wholly owned.

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DONALD CONN, GLORIA CONN,
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Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Central Distributors of Beer, Inc., respectfully petitions that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (including the dissenting opinion of Senior Circuit Judge Wellford) is reported at 5 F.3d 181, and is reprinted as Appendix A at pages A1 through A12.

(References to the appendices bound with this Petition are styled "A___"). The January 25, 1994 Court of Appeals' Order denying Plaintiff's Petition for Rehearing and/or Reconsideration is reprinted as Appendix B, at page A13.

The Amended Order of the United States District Court for the Eastern District of Michigan, Southern Division (LaPlata, D.J.) granting Defendants' Motion for Summary Judgment has not been reported. The District Court's ruling is reprinted as Appendix C, at pages A14 through A18.

JURISDICTION

The decision of the Court of Appeals was announced on September 23, 1993. Petitioner's Petition for Rehearing and/or Reconsideration was denied in an Order entered by the Court of Appeals on January 25, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1341:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the intended purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal

> Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both.

18 U.S.C. § 1343:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . transmits or causes to be transmitted by means of wire . . . communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both . . .

18 U.S.C. § 1961(1):

> "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . .

18 U.S.C. § 1962(c):

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . .

STATEMENT OF THE CASE

This is a claim brought by Petitioner, Central Distributors of Beer, Inc. ("Central Distributors"), pursuant to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), specifically 18 U.S.C. § 1962(c). Central Distributors has also asserted several state law claims.

Respondents Donald Conn, Gloria Conn and John Nate, Jr., through the enterprise of John Nate Beverage, Inc. ("Nate Beverage"), engaged in a pattern of racketeering activity involving wire fraud, mail fraud, "bootlegging" of beer and other crimes over a period of approximately six (6) years. Central Distributors was the victim of Respondents' racketeering activities.

Under the Michigan Liquor Control Act, MCLA § 436.1 *et seq.*, sellers of alcoholic beverages must be licensed by the State of Michigan. A licensed wholesaler may sell only to licensed retailers, and only licensed retailers may sell to individual consumers. Furthermore, each beer wholesaler has an exclusive territory. The boundaries of the territory are determined by contract between the wholesaler and the brewer. Within the wholesalers' exclusive territory, no other wholesaler may sell the brands of beer covered by the wholesaler-brewer contract. Sales outside a wholesalers' territory are both a breach of contract and a violation of the Michigan Liquor Control Act.

Central Distributors is a licensed wholesaler of various brands of beer brewed by Anheuser-Busch, Inc. ("Anheuser-Busch"), such as Budweiser, Bud Light and Michelob. Pursuant to the Michigan Liquor Control Act

and Central Distributors' Wholesaler Equity Agreement with Anheuser-Busch, Central Distributors has an exclusive geographic territory in which no other wholesaler may sell Anheuser-Busch beer to retailers. Central Distributors' exclusive territory includes most of Wayne County, Michigan (except the City of Detroit and the Grosse Pointes) plus a small portion of Oakland County, Michigan.

Respondent Nate Beverage is another Anheuser-Busch distributor located in Dowagiac, Michigan. Nate Beverage's exclusive territory is located approximately 150 miles away from Central Distributors' exclusive territory.

Respondents conspired to defraud Central Distributors by selling beer within Central Distributors' exclusive territory in violation of the Wholesaler Equity Agreement and the Michigan Liquor Control Act. These illegal sales damaged Central Distributors because only Central Distributors had the right to sell Anheuser-Busch beer to retailers within its exclusive territory.

Respondents' scheme to defraud Central Distributors involved wire fraud and mail fraud. Respondents used interstate telephone calls and mail to the Anheuser-Busch brewery in Columbus, Ohio to order the beer which was illegally sold in Central Distributors' exclusive territory. Interstate communications were necessary, because there is no Anheuser-Busch brewery located in the State of Michigan. Respondents obtained the beer under false pretenses by deceiving Anheuser-Busch into believing that the beer would be sold legally to retailers in Nate Beverage's exclusive territory. This deception was a necessary

part of Respondents' scheme to defraud Central Distributors, because Anheuser-Busch only sells beer to authorized wholesalers for sale within their own territories. Without these interstate telephone calls and letters, Respondents could not have obtained the Anheuser-Busch beer that was illegally sold in Central Distributors' exclusive territory. In addition, false weekly reports were submitted by Respondents to Anheuser-Busch about Nate Beverage's retail sales and inventory levels, in order to hide the illegal sales.

Respondents' scheme came to light when Respondent Donald Conn was arrested (and subsequently convicted) of selling beer without a license. After investigations by Central Distributors and law enforcement authorities revealed the extent of Respondents' illegal activities, Central Distributors filed suit against Respondents on October 6, 1989.

On February 28, 1991, the District Court issued an Order Granting Defendants' Motion for Dismissal and/or Summary Judgment. The District Court dismissed Central Distributors' Complaint, pursuant to Fed. R. Civ. P. 12(b)(6), for failing to allege wire fraud with sufficient specificity.

Central Distributors timely filed a Motion for Reconsideration and/or for Leave to Amend Complaint. The District Court granted that Motion on September 30, 1991, and Central Distributors filed its First Amended Complaint on October 31, 1991.

On March 5, 1992, the District Court entered its Amended Order Granting Defendants' Motion for Summary Judgment and Dismissing State Law Claims, holding that Central Distributors had not presented evidence sufficient to prove its RICO claim. The District Court then dismissed Central Distributors' state law claims for lack of federal jurisdiction, without considering the merits of those claims.

On March 19, 1992, Central Distributors timely filed its Notice of Appeal to the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit").

On September 23, 1993, the Sixth Circuit affirmed the District Court by a vote of 2 to 1, with Senior Circuit Judge Wellford dissenting. The majority held that wire fraud was not committed by Respondents because no misrepresentation was made *directly* to Central Distributors by Respondents. The Court stated:

> [W]e believe the district court properly granted summary judgment in favor of the defendants on the RICO complaint. In our opinion, the fraud connected with mail or wire fraud must involve misrepresentations or omissions flowing from the defendant to the plaintiff. Although a general fraudulent scheme which incidentally affects a person may support other civil claims against the wrongdoer, the victim cannot assert a RICO claim absent evidence that the defendant made representations to the victim.
>
> 5 F.3d at 184.

Senior Circuit Judge Wellford dissented, stating:

> This is a close and difficult case, in my view. It involves one of the most complex statutes ever

> enacted by Congress, the Racketeer Influenced and Corrupt Organizations Act. The plaintiff presented a detailed and definitive statement of its claim that the defendants knowingly defrauded it by participating in an ongoing scheme to its claimed detriment by invading its established territory and transacting business illegally because the defendant was an unlicensed and "bootleg" dealer. There seems to me to be several potential genuine issues of material fact presented after some considerable discovery with this case.
>
> * * *
>
> I believe the district court should have considered whether claimed instances of mail or wire fraud at least indirectly were utilized, "in furtherance of the scheme" engaged in by defendants, claimed to be ongoing and damaging to the plaintiff.
>
> 5 F.3d at 184-185.

Because the Sixth Circuit's decision was based on different grounds than the District Court's decision, Central Distributors timely filed a Petition for Rehearing and/or Reconsideration with the Sixth Circuit. On January 25, 1994, the Sixth Circuit denied Central Distributors' Petition for Rehearing and/or Reconsideration, without explanation.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's Ruling, That In Order To Constitute Wire Fraud The Defendant Must Make A False Statement Directly To The Person Defrauded, Is Inconsistent With the Language Of The Wire Fraud Act And Is In Direct Conflict With The Decisions Of Other Circuits.

A. There is a direct conflict among the eight circuits that have decided this issue.

Nothing in the mail fraud (18 U.S.C. § 1341) or wire fraud (18 U.S.C. § 1343) statutes states that a telephone call or letter must be sent directly to the person defrauded. Those statutes merely require that the mails or interstate wire communications be used for the purpose of executing the scheme to defraud.[1]

Including the instant case, at least eight different Circuit Courts have addressed the question whether a defendant must make a false statement directly to the person defrauded to support a claim of wire fraud or mail fraud, or whether it is sufficient for the defendant to use the wires or mails to communicate with a third person in order to help carry out the scheme to defraud. This question has arisen in both criminal prosecutions for wire or mail fraud, and civil RICO cases in which wire or mail fraud is a predicate act relied upon by the plaintiff to establish the RICO claim. There is no consensus among

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[1] "The Courts have uniformly given the same construction to the language in both the mail and wire fraud statutes with the sole distinction between the crimes being the interstate communication device utilized by the alleged offender." *Van Dorn Co. v. Howington*, 623 F. Supp. 1548, 1555 (D.Oh. 1985).

the Circuits on this issue. To the contrary, the state of the law on this issue is quite confused. Four Circuits (the First, Eighth, Ninth and Tenth Circuits) have decided that a fraudulent statement does not have to be made directly to the person defrauded. Another three Circuits (the First, Fourth and Sixth Circuits) have decided that a fraudulent statement must be made directly to the plaintiff (the so-called "convergence" requirement). The Second Circuit is split on this issue.

1. Four Circuits Have Ruled That No Statement To The Person Defrauded Is Necessary.

The First, Eighth, Ninth and Tenth Circuits (plus a District Court in the Eleventh Circuit) have all held that the fraudulent statements do not need to be made directly to the person defrauded to constitute wire or mail fraud. It is sufficient if the mails or interstate wires are used to further the scheme to defraud.

In *United States v. International Term Papers, Inc.*, 477 F.2d 1277, 1279 (1st Cir. 1973), interpreting the mail fraud statute, the First Circuit stated:

> 18 U.S.C. § 1341 makes it a federal offense to use the mails in connection with a scheme to defraud. It is not necessary that the mailing be between the perpetrator and the victim; any mailing in connection with the scheme is enough.

In *United States v. Wise*, 553 F.2d 1173 (8th Cir. 1977), the Eighth Circuit upheld a wire fraud conviction when defendant used interstate telephone wires in connection with the fraudulent scheme, even though the alleged

telephone conversation was not directed to the victim of the fraudulent scheme. The Eighth Circuit stated:

> Wise also contends that the indictment fails to set forth a violation of 18 U.S.C. § 1343 because the alleged communication was not directed to a victim of the fraudulent scheme. This contention is clearly without merit. All that the statute requires is a scheme to defraud and an interstate telephone call made in furtherance of the scheme.
>
> 553 F.2d at 1174.

In *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393 (9th Cir. 1986), the Ninth Circuit considered a scheme to defraud the plaintiff which was strikingly similar to the scheme concocted by Respondents in the instant case to defraud Central Distributors.[2] The Ninth Circuit described the scheme in *Schreiber* as follows: "Schrieber [a wholesaler with the exclusive right to sell a particular brand of appliances in Southern California] alleged that appellees fraudulently obtained a shipment of Chambers' [the manufactuer whose products Schrieber had the exclusive right to sell] products which they sold in Schreiber's exclusive territory." 806 F.2d at 1399.

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[2] There is *dictum* in *United States v. Lew*, 875 F.2d 219 (9th Cir. 1989) that the Ninth Circuit favors the convergence theory, but the actual holding in *Lew* was that no one was defrauded of money or property. A lawyer was accused of defrauding his clients by submitted fraudulent documents to the Immigration and Naturalization Service, but the clients were found to be willing participants in this scheme.

The *Schreiber* decision clearly establishes the following legal doctrine: Where (a) a wholesaler has the exclusive right to market a particular brand of product within a geographic area, (b) the defendant designs a scheme to defraud the wholesaler by obtaining that brand of product elsewhere and then selling it within the wholesaler's exclusive territory, and (c) the defendant fraudulently obtains the product by making misrepresentations in an interstate telephone call to the manufacturer about where those products will really be sold by the defendant, wire fraud has occurred.

The only differences between the scheme to defraud the plaintiff in *Schreiber* and the scheme to defraud Central Distributors in this matter are (a) that the plaintiff in *Schreiber* had an exclusive territory to sell appliances, rather than beer; and (b) that the activities of the Respondents in the instant case continued for a substantial period of time (over six years), while the activities of the *Schreiber* defendants apparently continued for a more limited period of time. In other words, Central Distributors has an even stronger claim than the plaintiff in *Schreiber*.

In *United States v. Puckett*, 692 F.2d 663, 669 (10th Cir. 1982), *cert. denied*, 459 U.S. 1091, the Tenth Circuit stated that "the communication proscribed by the wire fraud statute need not be directed to the victim of the fraudulent scheme." The Tenth Circuit also took the same position five decades earlier, in *McNear v. United States*, 60 F.2d 861, 863 (10th Cir. 1932) ("[T]he statute does not require the mailing of a letter to the victim. It is enough if it is mailed to another, in furtherance of the scheme.")

A District Court in the Eleventh Circuit held that "the party injured by the acts of mail and wire fraud may state a [civil RICO] claim, even though the parties deceived . . . differ from the parties deprived of property as a result of the deception." The Court further stated that "nothing in the statute exempts from prosecution persons who achieve fraudulent objectives through the deception of third parties." *Texas Air Corporation v. Air Line Pilots Association*, 1989 United States Dist. LEXIS 11149; 113 Lab. Cas. (CCH) ¶11,776 (S.D.Fl. 1989).

2. Three Circuits Have Ruled That A Statement To The Person Defrauded Is Required.

Three Circuits have held that there must be a "convergence" between the person deceived by the wire fraud or mail fraud and the person defrauded of property.

In the instant case, the Sixth Circuit held that "the fraud connected with mail or wire fraud must involve misrepresentations or omissions flowing from the defendant to the plaintiff." *Central Distributors of Beer, Inc. v. Conn*, 5 F.3d at 184.

The First Circuit in *McEvoy Travel v. Heritage Travel, Inc.*, 904 F.2d 786 (1st Cir. 1990), also held that the fraudulent statements must be made directly to the victim.[3] A travel

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[3] Several of the Courts which have held that the person deceived must be the same as the person defrauded relied on *McNally v. United States*, 483 U.S. 350, 97 L.Ed.2d 292, 107 S. Ct. 2875 (1987). However, that was not the issue decided by this Court in *McNally*. In *McNally*, this Court held that, based on the statutory language and legislative history, the mail fraud statute applied only

agency could not bring a claim based on misrepresentations made by a competitor to a regulatory association.

The Fourth Circuit held, in *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988), that a plaintiff must show detrimental reliance on misrepresentations in order to establish a RICO claim. While *Brandenburg* implied that no RICO claim could be based on the deception of a third party to defraud the plaintiff, the case did not actually involve communications to a third party. In two subsequent cases, district courts within that circuit have adopted the "convergence" theory. In *Mylan Laboratories, Inc. v. Akzo, N.Z., et al.*, 770 F. Supp. 1053 (D.Md. 1991). The Court concluded that:

> This Court feels that the better rule is to require that the person allegedly deceived by the misrepresentations be the person injured by the misrepresentations. This convergence of identity seems inherent in the idea of fraud as provided in the fraud statutes and defined by the Supreme Court in *McNally*. Moreover, the Fourth Circuit's holding in *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988), suggests that this is the proper course. Accordingly, to the extent Mylan's claim of mail and wire fraud rests on the grounds that it was injured by defendants' false submissions to the FDA, the claim must fail.
>
> 770 F. Supp. at 1074.

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to schemes to defraud someone of money or property, and did not protect the "intangible right of the citizenry to good government." Furthermore, on November 18, 1988, Congress added 18 U.S.C. § 1346 to the mail fraud statute in order to overturn the effect of the *McNally* decision. Another reason to grant certiorari in this case is to address the effect of the *McNally* decision and the enactment of 18 U.S.C. § 1346 on the convergence theory.

Similarly, in *Lifschultz Fast Freight v. Consolidated Freightways*, 805 F. Supp. 1277 (D.S.C. 1992), the Court stated:

> This Court finds that the better reasoned rule is to require a convergence of the identity of the injured and the deceived. That is, the person allegedly injured by the misrepresentations must be the person allegedly deceived by the misrepresentations.
>
> 805 F. Supp. at 1294.

3. The Second Circuit Is Split On This Issue.

The Second Circuit has had conflicting decisions within the Circuit with respect to this issue of whether the fraudulent statements must be made to the victim.

In *United States v. Evans*, 844 F.2d 36, 39 (2d Cir. 1988), the Second Circuit, in a criminal case, stated in *dictum* that the Defendants could not be guilty of mail fraud unless the person deceived was also the person injured. In *Corcoran v. American Plan Corp.*, 886 F.2d 16 (2d Cir. 1989), the Second Circuit agreed with *Evans*, but did not actually decide the issue. In *United States v. Eisen*, 974 F.2d 246 (2d Cir. 1992), the Court discussed *Evans* and noted that there was a split of authority developing on the issue. *Id.* at 253, n.2. The *Eisen* Court did not decide whether "convergence" was required, because it held that the person injured in that case was also the person deceived.

Despite the *dicta* to the contrary in *Evans, Corcoran* and *Eisen*, two district courts in the Second Circuit have held that there need not be convergence between the person deceived and the person defrauded. In *Metromedia Co. v. Fugazy*, 753 F. Supp. 93 (S.D.N.Y. 1990), the Court stated: "Even if only a

third party, and not the plaintiff was deceived, the requirement of reliance is met if the plaintiff was injured by the fraud." 753 F. Supp. at 98.

Similarly, in *Shaw v. Rolex Watch USA, Inc.*, 726 F. Supp. 969 (S.D.N.Y. 1989), the Court held that "[A] plaintiff who is injured as a proximate result of fraud should be able to recover regardless of whether he or a third party is the one deceived." 726 F. Supp. at 973.

B. This Court has never directly addressed this issue.

This Court has never directly addressed the issue, but its prior decision in *Pereira v. United States*, 347 U.S. 1, 74 S. Ct. 358, 98 L.Ed.2d 435 (1954) suggests that this Court would hold that no direct communication to the defrauded party is necessary to establish wire fraud or mail fraud. In *Pereira*, the defendant defrauded his victim by courting and then marrying her for her money. The defendant was convicted of mail fraud because a check (the proceeds of the scheme to defraud) was mailed from the victim's bank in another state. All of the communications between the defendant and his victim were in person. This Court held that a person could be convicted of mail fraud even if he did not actually put the misleading document in the mail as long as the defendant's actions caused the document to be mailed. This Court concluded that even though defendant did not personally mail the check, he was guilty of mail fraud because the mail was used to execute the scheme to defraud. Nothing in this Court's decision in *Pereira* even suggested that the mails must be used to deceive the person defrauded, only that the mail be used as part of the scheme to defraud.

This Court should grant certiorari to resolve the conflict between the Circuits. This is particularly important because the conflict affects not only civil RICO cases, but also criminal prosecutions under the mail and wire fraud statutes. The lower courts and practitioners need guidance from this Court on whether mail fraud or wire fraud can be committed without direct communication to the person defrauded, and whether that conduct can be the predicate act for a civil RICO claim.

II. The Sixth Circuit's Ruling That The Elements Of Wire Fraud Differ Depending Upon Whether The Case Is A Criminal Prosecution Or A Civil Case Under the Racketeer Influenced And Corrupt Organizations Act Is In Conflict With A Prior Decision Of This Court.

Comparing its decision in the instant case with its decision in a prior criminal wire fraud case, the Sixth Circuit has essentially ruled that the elements of wire fraud differ depending upon whether the case is a criminal prosecution or a civil case under RICO in which wire fraud is alleged as a predicate act. This result is inconsistent with the prior decision of this Court in *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479, 87 L.Ed.2d 346, 105 S. Ct. 3275 (1985). In *Sedima*, this Court held that a prior criminal conviction is not necessary to establish a RICO predicate act. All that is required is that the act be *indictable* under one of the criminal statutes enumerated in 18 U.S.C. § 1961(1). Respondents' conduct is indictable in the Sixth Circuit.

In *United States v. Ames Sintering Co.*, 927 F.2d 232 (6th Cir. 1990), two of the three judges of the Sixth Circuit who heard the instant case below considered an appeal from a

criminal wire fraud conviction. The defendants in *Ames Sintering* conspired to rig bids on a contract with General Motors. The wire fraud convictions were based upon interstate telephone calls between suppliers of General Motors. No telephone calls were made directly to General Motors. The Sixth Circuit affirmed the wire fraud convictions because the defendants used interstate wire communications to further their scheme to defraud General Motors. The Sixth Circuit held that it was not necessary for the scheme to defraud to succeed for wire fraud to be committed. The Sixth Circuit did not hold, or even suggest, that an interstate telephone call to General Motors was necessary to support the wire fraud conviction.

Despite its prior ruling in *Ames Sintering*, the Sixth Circuit held that Central Distributors could not establish its RICO claim because there were no communications directly by the defendants to Central Distributors. The Sixth Circuit's decision in the instant case is simply inconsistent with this Court's decision in *Sedima*, because now the elements of wire fraud differ in the Sixth Circuit depending upon whether the case before the Court is a criminal prosecution or a civil RICO case.

CONCLUSION

For all these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: April 25, 1994

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 92-1453

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CENTRAL DISTRIBUTORS OF BEER, INC., *Plaintiff-Appellant,* *v.* DONALD CONN, an individual; GLORIA CONN, an individual; JOHN NATE BEVERAGE, INC., a Michigan Corporation; and JOHN NATE, JR., an individual, jointly and severally, *Defendants-Appellees.*	ON APPEAL from the United States District Court for the Eastern District of Michigan

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Decided and Filed September 23, 1993

Before: MARTIN and SUHRHEINRICH, Circuit Judges; and WELLFORD, Senior Circuit Judge.

MARTIN, Circuit Judge, delivered the opinion of the court, in which SUHRHEINRICH, Circuit Judge, joined. WELLFORD, Senior Circuit Judge (pp. 8-11), delivered a separate dissenting opinion.

BOYCE F. MARTIN, JR., Circuit Judge. Central Distributors of Beer, Inc. filed this action against Donald Conn, Gloria Conn, John Nate Beverage, Inc., and John Nate, Jr. for violation of Central Distributors' exclusive beer distribution rights with Anheuser-Busch, Inc. The complaint alleged four state law claims and one claim under the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* The district court granted summary judgment in favor of the defendants on the RICO claim, finding that Central Distributors had failed to prove that the defendants had committed any predicate act to support the RICO claim. The district court then dismissed Central Distributors' state law claims for lack of subject matter jurisdiction. We affirm.

Central Distributors is a wholesaler of Anheuser-Busch brands of beer. Pursuant to the Michigan Liquor Control Act and the Wholesaler Equity Agreement between Central Distributors and Anheuser-Busch, Central Distributors has an exclusive territory that includes much of Wayne County, Michigan and part of Oakland County, Michigan. Under the exclusive territory agreement, Central Distributors had the exclusive distribution rights for Anheuser-Busch products to retailers in its territory. John Nate Beverage, Inc., another wholesaler of Anheuser-Busch products, had an exclusive distribution agreement with Anheuser-Busch in another part of Michigan. The Michigan Liquor Control Act also prohibited a distributor with an exclusive distribution territory from selling beer to retailers located outside its exclusive territory, and the Act permits the sale of beer only to licensed retailers.

According to Central Distributors' Complaint, Donald and Gloria Conn purchased large quantities of Anheuser-Busch products from Nate Beverage between 1983 and 1989. The Conns are not licensed retailers under the Michigan Liquor Control Act. The Conns allegedly transported the beer they purchased from Nate Beverage to their home, which was located in the Central Distributors exclusive distribution territory. The Conns then sold the beer to retailers and individuals in Central Distributors' exclusive territory. According to the complaint, Nate Beverage sold the beer to the Conns knowing that the Conns intended to sell and did sell the beer in Central Distributors' distribution territory. Central Distributors argues that the defendants engaged in this scheme to defraud Central Distributors by usurping sales that otherwise would have been made by Central Distributors or one of its retailers.

Central Distributors also alleged that Nate Beverage and the Conns engaged in an illegal scheme under the Michigan Bottle Bill to defraud Central Distributors. Under the Bottle Bill, a distributor must charge a deposit of ten cents for each bottle or can of beer that it sells to a retailer. The retailer then charges the deposit to the individual purchaser. When the purchaser returns the container, the retailer refunds the deposit and, in turn, seeks a refund from the distributor. According to Central Distributors, Nate Beverage sold empty beverage containers to the Conns for which Nate had already repaid the deposit to the retailer. The Conns then sold the empty containers to retailers within Central Distributors' territory, and the retailers returned the containers to Central

Distributors for a refund of a deposit that the retailer never paid to Central Distributors.

Central Distributors filed this action against the Conns, Nate Beverage, and John Nate, Jr., alleging four state law claims and one claim under the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* In its RICO claim, Central Distributors alleges that the defendants committed mail and wire fraud by engaging in this scheme to sell beer to retailers within Central Distributors' exclusive territory and to obtain false refunds of deposits from Central Distributors. The defendants filed a motion to dismiss the action for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6), but the district court denied this motion and afforded Central Distributors an opportunity to amend its complaint.

After Central Distributors filed an amended complaint, the defendants again filed a motion to dismiss or for summary judgment with the district court. The district court granted summary judgment in favor of the defendants on Central Distributors' RICO claim, finding that Central Distributors had failed to present evidence to support its claim that mail or wire fraud were the predicate acts to support its RICO claim. Specifically, the court found (1) undisputed evidence that the Conns were not aware of the existence of Central Distributors before the commencement of this action; (2) no evidence that John Nate, Jr. sold beer to the Conns through Nate Beverage with any intent to defraud Central Distributors; and (3) no evidence that the Conns purchased from Nate any of the beer he distributed in Central Distributors' territory. Because the RICO claim had provided the only basis for

the district court's jurisdiction, the court dismissed Central Distributors' remaining state law claims. Central Distributors now appeals, and we affirm.

Under FED. R. CIV. P. 56(c), the district court may grant summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Id.* at 322-23. Our review of a district court's grant of summary judgment is *de novo*. *Brooks v. American Broadcasting Cos., Inc.*, 932 F.2d 495, 500 (6th Cir. 1991). Moreover, we view all evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A violation of 18 U.S.C. § 1962(c), the provision of RICO upon which Central Distributors relies to support its claim, consists of the following elements: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. V. Imrex Co.*, 473 U.S. 479, 496 (1985). " 'Racketeering activity' is defined in 18 U.S.C. § 1961(1)(B) as including any act 'indictable' under certain enumerated federal criminal statutes, including 18 U.S.C. § 1341, which makes mail fraud a criminal offense, and 18 U.S.C. § 1343, which makes wire fraud a crime." *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1399 (9th Cir. 1986). A civil RICO action does not require that there be a prior criminal conviction for

the conduct forming the predicate act; however, the conduct used to support a civil RICO action must be *indictable*. *Sedima*, 473 U.S. at 481-82. *See also* 18 U.S.C. § 1961(1). Thus, the plaintiff must prove each prong of the predicate offense, or "racketeering activity," to maintain a civil action under the RICO statute. *See Sedima*, 473 U.S. at 488-92. "In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the [predicate act] constituting the violation." *Id.* at 496.

The predicate acts upon which Central Distributors relies to establish racketeering activity by the defendants are mail fraud and wire fraud. To maintain its RICO action, Central Distributors must show that each element of mail fraud or wire fraud has been committed by the defendants. "To allege a violation of the mail fraud statute, it is necessary to show that (1) the defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud." *Schreiber*, 806 F.2d at 1399-1400. "Similarly, a wire fraud violation [sic] consists of (1) the formation of a scheme or artifice to defraud (2) use of the United States wires or causing a use of the United States wires in furtherance of the scheme; and (3) specific intent to deceive or defraud." *Id.* at 1400. Therefore, Central Distributors cannot maintain a civil RICO claim against these defendants absent evidence that the defendants made misrepresentations or omissions of material fact to Central Distributors and evidence that Central Distributors relied on those misrepresentations or omissions to its

detriment. *See Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984). *See also Blount Financial Svcs., Inc. v. Walter E. Heller & Co.*, 819 F.2d 151, 152 (6th Cir. 1987) (holding that the plaintiff must plead with particularity the false statements of fact made by the defendants to the plaintiffs and the facts showing that the plaintiff relied on those statements to its detriment); *Schreiber*, 806 F.2d at 1400 (noting that the plaintiff properly pleaded that the defendants had made misrepresentations to the plaintiff and that the plaintiff had detrimentally relied on those statements). Thus, the defendant must make a false statement or omission of fact *to the plaintiff* to support a claim of wire fraud or mail fraud as predicate act for a RICO claim.

Assuming that Central Distributors has met the requirement that it plead the acts of mail and wire fraud with particularity, *Blount Financial Svcs.*, 819 F.2d at 152, we believe the district court properly granted summary judgment in favor of the defendants on the RICO complaint. In our opinion, the fraud connected with mail or wire fraud must involve misrepresentations or omissions flowing from the defendant to the plaintiff. Although a general fraudulent scheme which incidentally affects a person may support other civil claims against the wrongdoer, the victim cannot assert a RICO claim absent evidence that the defendant made representations to the victim. Central Distributors has not produced a shred of evidence showing that any of the defendants made any false statements or omissions to Central Distributors or that Central Distributors relied on any statement or omission to its detriment. In fact, as the district court noted, evidence in the record demonstrates that the Conns were

not even aware of the existence of Central Distributors until after the commencement of this action. Moreover, Central Distributors never had direct contact with any of the defendants during the time that the Conns were allegedly selling beer in Central Distributors' exclusive territory. In our mind, Central Distributors has failed to point to any testimony or evidence that John Nate, Jr. sold beer through Nate Beverage to the Conns with any intent to defraud Central Distributors. Although the defendants may have committed other wrongs by this scheme, nothing in the record supports Central Distributors' claim that the defendants violated RICO in any way.

Accordingly, the judgment of the district court is affirmed.

WELLFORD, senior Circuit Judge, dissenting.

I. *SUMMARY JUDGMENT*

This is a close and difficult case, in my view. It involves one of the most complex statutes ever enacted by Congress, the Racketeer Influenced and Corrupt Organizations Act. The plaintiff presented a detailed and definitive statement of its claim that the defendants knowingly defrauded it by participating in an ongoing scheme to its claimed detriment by invading its established territory and transacting business illegally because the defendant was an unlicensed and "bootleg" dealer. There seems to me to be several potential genuine issues of material fact presented after some considerable discovery with this case.

First is the issue of whether the defendant Conn knew that he was illegally dealing in the plaintiff's territory. See, for example, the deposition testimony of Mr. Busatti, and consider reasonable inferences to be drawn from the circumstances established by the plaintiff (including Conn's false story that he was buying beer from an uncle from western Michigan).

Nate's unusual relationship with Conn and suspicious deliveries to Conn within the plaintiff's territory raises the issues of Nate's knowledge of the illegal transactions. Consider Conn's loading a U-Haul at Nate's place of business and the loading of a white truck there similar to the one making deliveries to Conn. *See* Hunsbergen's deposition testimony.

We review the grant of summary judgment *de novo* and view all the evidence and reasonable inferences to be drawn therefrom in a "light most favorable to the nonmoving party," as stated by the majority. I believe the district court should have considered whether claimed instances of mail or wire fraud at least indirectly were utilized "in furtherance of the scheme" engaged in by defendants, claimed to be ongoing and damaging to the plaintiff.. I concede the questionable showing here that the defendants made false representations to the plaintiffs and that the plaintiff relied on these misrepresentations to its detriment.

I believe remand is appropriate, however, so that the district court may hear argument on these close and difficult issues. The Plaintiff expressly requested a hearing and this was rejected by the district judge. I am persuaded that the plaintiff has demonstrated sufficient

likelihood of genuine contested issues of material fact that the district court improperly granted summary judgment.

II. *ORAL ARGUMENT*

While the *Sixth Circuit Federal Practice Manual* is generally aimed at practice before the courts of appeals, I believe its discussion of "The Importance of Oral Argument" is relevant with respect to dispositive motions pending before district courts in this circuit. In that Manual, the authors note that

> Oral argument is of great importance in the Sixth Circuit. Although different judges may give different weight to oral argument, all judges use oral argument to clarify issues and to inquire into the record.[7]

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[7] For an informative discussion of the views of various Sixth Circuit judges toward oral argument, see Rose, *Oral Argument in the Sixth Circuit*, 19 U. Tol. L. Rev. 229 (1988).

Sixth Circuit Federal Practice Manual at 112. An eminent academician stated the same thought well:

> Oral expression, especially in response to intelligent questioning, can convey ideals better than cold print can. It can supplement and clarify arguments that are not adequately set forth in briefs; it can rivet attention upon matters that a reader may have passed over too lightly . . . counsel heard in oral argument should be better satisfied that, by both written and oral presentations, he has had maximum opportunity to present his client's cause.

Robert A. Leflar, *Internal Operating Procedures of Appellate Courts* (American Bar Foundation 1976), at 32.

The importance of oral argument is emphasized by the fact that, in a majority of cases, the decision is ultimately reached in accordance with the impression that the judges have as they leave the bench. While it is quite true that the impression after oral argument derives from the reading of the briefs as well as from the argument, it is also true that the impression from reading the briefs may be changed or modified by the oral argument. Although the oral argument and brief complement each other, each serves a different purpose. The oral argument should be something in the nature of a tour de force designed to persuade the judges that fair play and precedent support the position of the advocate.

Concededly, Fed. R. Civ. P. 56 does not require an oral hearing, but Rule 56(c) seems to indicate that an actual "hearing" is (or should be) the usual course for dispositive summary judgment motions: "The motions shall be served at least 10 days before the time fixed for the hearing." Fed. R. Civ. P. 56(c).

In this particular case, I believe it was an abuse of discretion on the part of the district court not to conduct a hearing and permit oral

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The Federal Rules provide for a *hearing* with respect to certain definitive motions, which, like the present motion, may be dispositive of the case. *See* Fed. R. Civ. P. 12:

> FRCP 12(d) requires that a FRCP 12(b) motion for dismissal or a FRCP 12(c) motion for judgment on the pleadings be disposed of only after a hearing, which affords an opportunity to present legal arguments either orally, in writing, or both at the district court's discretion.

27 *Federal Procedure* § 62.375 (Lawyers Ed. 1984).

argument in this difficult and involved case. "Where the district court must assess the relative credibility of witnesses, the case is particularly inappropriate for summary judgment and requires a full hearing on the merits." *In re Atlas Concrete Pipe, Inc.*, 668 F.2d 905, 909 (6th Cir. 1982) ("The district court should be reluctant to dispose of a complex case on summary judgment. . . . " *Id.* at 908 n.5). RICO is a difficult statute fraught with problems in its interpretation. A corporate defendant that engages in fraudulent activities of a type described as "racketeering," and which is "the direct or indirect beneficiary of the pattern of racketeering activity" may be liable to a damaged and defrauded plaintiff. *Schreiber Distributing v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1398 (9th Cir. 1986). *See also Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985). *Compare*, however, *Blount Financial Services, Inc. v. Walter E. Heller Co.*, 819 F.2d 151 (6th Cir. 1987). I believe the district court should have heard argument on whether the defendants carried the "burden of *clearly establishing* the non-existence of any genuine issue of fact material to a judgment in his favor." *United States v. Articles of Device*, 527 F.2d 1008, 1011 (6th Cir. 1976) (emphasis added).

I would **REVERSE** and **REMAND** this case, under the circumstances, for the district court to consider further the summary judgment issues and to fix a time promptly to hear oral argument thereon.

APPENDIX B

Case No: 92-1453

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

CENTRAL DISTRIBUTORS OF BEER INCORPORATED, a Michigan corporation

Plaintiff – Appellant

v.

DONALD CONN; GLORIA CONN; JOHN NATE BEVERAGE, INCORPORATED, a Michigan Corporation; JOHN NATE, JR.

Defendants – Appellees

(Filed Jan. 25, 1994)

BEFORE: MARTIN and SUHRHEINRICH, Circuit Judges; WELLFORD, Senior Judge

Upon consideration of the petition for rehearing filed by the appellant; and the appellant's motion to stay the issuance of the mandate until 30 days after the petition is ruled upon,

It is **ORDERED** that the petition for rehearing and the motion to stay are **DENIED**.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green,
Leonard Green, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CENTRAL DISTRIBUTORS OF BEER, INC.,

Plaintiff,

vs.

DONALD CONN, et. al., jointly and severally,

Defendants.
_____/

C.A. No. 89-CV-60258-AA

HON. GEORGE La PLATA

AMENDED ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DISMISSING STATE LAW CLAIMS

I. INTRODUCTION

On October 6, 1989, Plaintiff, Central Distributors of Beer, Inc., commenced this action against four named Defendants including Donald and Gloria Conn, John Nate Beverage, Inc. and John Nate, Jr. Pursuant to this Court's order, Plaintiff was permitted to file a First Amended Complaint. In its five count First Amended Complaint, Plaintiff alleges four state law violations and one violation of the Racketeering Influenced and Corrupt and Organizations Act ("RICO"),[1] which serves as this Court's jurisdictional basis.

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[1] 18 U.S.C.A. §1961-1968, which is Title IX of the Organized Crime Control Act of 1970.

II. FACTS

Plaintiff, a Michigan corporation, is a state licensed wholesaler of beer. Pursuant to a Wholesalers Equity Agreement executed between Anheuser-Busch and Plaintiff, Plaintiff was awarded an exclusive territory in which to sell Anheuser-Busch products to retailers primarily in Wayne County, Michigan. Defendant John Nate Beverages, Inc. is a Michigan corporation that possesses an exclusive territory in which to sell Anheuser-Busch products to retailers consisting of Dowagiac, Michigan. The gravamen of Plaintiff's Complaint consists of allegations that (1) Donald Conn, an individual not licensed to distribute beer in Michigan, distributed beer to retailers within Plaintiff's exclusive jurisdiction; (2) the beer which Conn distributed was supplied by John Nate Beverages, Inc.; and (3) John Nate, Jr. was aware that the beer he supplied to Conn through John Nate Beverages, Inc. would be distributed in Plaintiff's exclusive territory. Because this Court's jurisdiction is predicated upon Count IV of the Complaint, the Court shall initially consider the merits of Plaintiff's RICO claim.

The United States Supreme Court crafted what has become the seminal case regarding RICO, *Sedima, S.P.R.L. v. Imrex Co.*[2] In that case the four elements which must be alleged to sustain a RICO claim under 18 U.S.C.A. §1962(c) were set forth: "(1) conduct; (2) of an enterprise; (3) through a pattern; and (4) of racketeering activity."[3]

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[2] 473 U.S. 479 (1985).

[3] *Id.* at 496.

"Racketeering activity" means "any act or threat involving" specified state-law crimes, any "act" indictable under specified federal statutes, and certain federal "offenses".[4] A "pattern" requires "at least two acts of racketeering activity" within a 10 year period.[5]

The substance of Plaintiff's RICO claim is contained in paragraphs 60 and 61 of its' First Amended Complaint. Each Defendant filed a motion seeking summary judgment predicated on numerous grounds. For simplicity sake, the Court shall consider the motions as joint.

Initially, Defendants contend that Plaintiff did not state the pattern of racketeering activity with specificity in violation of Federal Rule of Civil Procedure 9(b). Rule 9(b) provides in pertinent part that "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity". Fraud claims brought under the RICO Act are subject to the particularity and specificity requirements of Rule 9(b).[6] Pleading of fraud must provide enough specificity to allow the defendant "a reasonable opportunity to answer the complaint" and must give "adequate information" to allow the defendant to frame a response.[7] While not ruling on the issue, the Court will assume for purposes of this motion that the RICO claim is stated with sufficient specificity.

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[4] See, 18 U.S.C.A. §1961(1).

[5] See, 18 U.S.C.A. §1961(5).

[6] *Bender v. Southland Corp.*, 749 F.2d 1205 (6th Cir. 1984).

[7] See, *Ross v. A.H. Robins Co.*, 608 F.2d 545 (2nd Cir. 1979).

The predicate acts which Plaintiff relies upon to establish a pattern of racketeering are wire fraud and mail fraud. Under RICO mail fraud or wire fraud may constitute a racketeering act. To establish mail or wire fraud Plaintiff must prove three elements including that defendant knowingly and wilfully participated in the scheme of artifice to defraud, with knowledge of its fraudulent nature and with specific intent to defraud.[8] Defendants contend that Plaintiff has failed to come forth with any evidence to establish this element.

It is uncontroverted that Donald Conn was not aware of the existence of Central Distributor prior to the commencement of this law suit. Plaintiff's response to Defendants' motions does not direct the Court to any testimony or evidence which intimates that John Nate, Jr. sold beer to Conn through Nate Beverage with any intent to defraud Plaintiff. In fact, there is no evidence to suggest any beer illegally distributed by Conn in Plaintiff's territory was purchased from Nate. There is no question, if Plaintiff's allegations are true, that John Nate, Jr. and/or Nate Beverage, Inc. illegally sold beer to Conn. However, there is nothing on this record to support Plaintiff's RICO count predicated on wire or mail fraud.

III. CONCLUSION

Viewing the evidence in a light most favorable to Plaintiff, and for the reasons stated above, the Court concludes that Plaintiff has failed to come forth with any

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[8] See, 18 U.S.C.A. §1341.

evidence to support its RICO claim. Accordingly, Defendants' Motion for Summary Judgment is GRANTED. In light of this ruling, it is unnecessary to consider any further issues raised by Defendants. Because this Court's jurisdiction is based upon Count IV, the remaining state law claims shall be DISMISSED.

/s/ George La Plata
George La Plata
U. S. District Judge

March 5, 1992
Ann Arbor, MI

A TRUE COPY

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EASTERN DISTRICT OF
MICHIGAN

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FILED
MAY 19 1994
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No. 93-1688

In The

Supreme Court of the United States

October Term, 1993

CENTRAL DISTRIBUTORS OF BEER, INC.,

Petitioner,

v.

DONALD CONN, GLORIA CONN
JOHN NATE BEVERAGE, INC.,
AND JOHN NATE, JR.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

PETITIONER

Central Distributors of Beer, Inc.

RESPONDENTS

John Nate Beverage, Inc. and John Nate, Jr.

OTHER RESPONDENTS

Donald Conn and Gloria Conn

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No. 93-1688

In The

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CENTRAL DISTRIBUTORS OF BEER, INC.,

Petitioner,

v.

DONALD CONN, GLORIA CONN
JOHN NATE BEVERAGE, INC.,
AND JOHN NATE, JR.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

The statement provided by the Petitioner appears to be correct on invoking the jurisdiction of this Court under 28 USC § 1254(1) in that Petitioner's Petition for Writ of Certiorari was entered within the 90-day time period from Petitioner's Petition for Rehearing and/or Reconsideration which was denied by Order entered by the Court of Appeals for the Sixth Circuit on January 25, 1994.

STATEMENT OF THE CASE

Central Distributors of Beer, Inc. filed this action against Donald Conn, Gloria Conn, John Nate Beverage, Inc. and John Nate, Jr. for violation of Central Distributors' exclusive beer distribution rights with Anheuser Busch, Inc. The Complaint alleged four state law claims and one claim under the Racketeering Influenced and Corrupt Organizations Act, 18 USC § 1961 et seq. The District Court granted summary judgment in favor of the Defendants/Respondents on the RICO claim, finding that Central Distributors had failed to prove that the Defendants had committed any predicate acts to support the RICO claim. The District Court then dismissed Central Distributors' state law claim for lack of subject matter jurisdiction.

On March 19, 1992, Central Distributors filed its Notice of Appeal to the United States Court of Appeals for the Sixth Circuit. On September 23, 1993, the Sixth Circuit affirmed the District Court, and Central Distributors subsequently filed a Petition for a Rehearing and/or Reconsideration with the Sixth Circuit. On January 25, 1994, the Sixth Circuit denied Central Distributors' Petition for Rehearing and/or Reconsideration.

REASONS FOR DENYING THE PETITION

The decision of the Sixth Circuit is adequately supported by the record, and rests upon well-developed principals of law within its own Circuit's opinions as well as the opinions of other Circuits that have addressed the issue. The Petitioner has failed to present any special or

important reasons for granting the Petition nor any other basis recognized by this Court, and as a result, the Petition should be denied.

I. FACTUAL SUMMARY

Petitioner, Central Distributors, is a wholesaler of Anheuser Busch brands of beer. Pursuant to the Michigan Liquor Control Act and the Wholesaler Equity Agreement between Central Distributors and Anheuser Busch, Central Distributors has an exclusive territory which includes much of Wayne County, Michigan and part of Oakland County, Michigan. Under the exclusive territory agreement, Central Distributors had the exclusive distribution rights for Anheuser Busch products to retailers in its territory.

John Nate Beverage, Inc., another wholesaler of Anheuser Busch products had an exclusive distribution agreement with Anheuser Busch for a territory on the western side of the state of Michigan. As an indication of size of the two distributors, in 1989 Central Distributors sold 4,843,307 cases of beer. During that same year, Defendant/Respondent Nate Beverage sold 538,518 cases of beer.

According to Central Distributors' Complaint, Donald Conn a retired school teacher and Gloria Conn, a school administrator, purchased quantities of Anheuser Busch products from Nate Beverage between 1983 and 1989. The Conns are not licensed retailers under the Michigan Liquor Control Act. The Conns allegedly transported the beer they purchased from Nate Beverage to

their home, which was located in the Central Distributors' exclusive distribution territory. It was alleged in Central's Complaint that the Conns then sold the beer to retailers and individuals in Central's exclusive territory. According to the Complaint, Nate Beverage sold the beer to the Conns knowing the Conns intended to sell, and did sell the beer, in Central's territory. Central Distributors argues the Defendants engaged in this scheme to defraud Central Distributors by usurping sales that otherwise would have been made by Central Distributors or one of its retailers.

Central Distributors also alleged that Nate Beverage and the Conns engaged in an illegal scheme under the Michigan Bottle Bill to defraud Central Distributors. Under the bottle bill, a distributor must charge a deposit of 10 cents for each bottle or can of beer that it sells to a retailer. The retailer then charges the deposit to the individual purchaser. When the purchaser returns the container, the retailer refunds the deposit and, in turn, seeks a refund from the distributor. According to Central Distributors, Nate Beverage sold empty beverage containers to the Conns for which Nate had already repaid the deposit to the retailer. Central alleges in its Complaint that the Conns then returned the empty containers to retailers within Central Distributors' territory for the 10 cent deposit, and the retailers returned the containers to Central Distributors for a refund of the deposit that the retailer never paid to Central Distributors.

During the years that this alleged racketeering activity took place, Central Distributors was underredeemed on empties. Underremption means that Central Distributors of Beer actually sold more full containers and

received deposits on those full containers than they repaid on the return of empty containers, leaving Central with a windfall. Central Distributors is contending in its Complaint that its windfall would have been greater had the Conns not been engaged in returning the empty containers within its exclusive distribution area.

Central Distributors filed this action against the Conns, Nate Beverage and John Nate, Jr. alleging four state law claims and one claim under the Racketeering Influenced and Corrupt Organizations Act, 18 USC § 1961, et seq. In its RICO claim, Central alleges that the Defendants committed mail and wire fraud by engaging in this scheme to sell beer to retailers within Central Distibutors' exclusive territory and to obtain false refunds for deposits from Central Distributors. The Defendants filed a motion to dismiss the action for failure to state a claim upon which relief could be granted. FR Civ. P. 12(b)(6). The District Court granted this motion and afforded Central Distributors an opportunity to amend its Complaint.

After Central Distributors filed an Amended Complaint, the Defendants again filed a motion to dismiss and motion for summary judgment. The District Court granted summary judgment in favor of the Defendants, finding that Central Distributors had failed to present evidence to support its claim that acts of mail or wire fraud existed to support its RICO claim. Specifically, the Court found that there was:

No evidence that John Nate, Jr. sold beer to the Conns through Nate Beverage with any intent to defraud Central Distributors; and there was nothing on the record

to support Plaintiff's RICO count predicated on wire or mail fraud.

Central Distributors appealed to the Sixth Circuit and after entertaining briefs on the issues and oral arguments, the Sixth Circuit, on September 23, 1993, affirmed the District Court by a vote of two to one, with Senior Circuit Judge Welford dissenting. The Court of Appeals ruled that:

> In our opinion, the fraud connected with mail or wire fraud must involve misrepresentations or omissions flowing from the defendant to the plaintiff. Although a general fraudulent scheme which incidentally affects a person may support other civil claims against the wrongdoer, the victim cannot assert a RICO claim absent evidence that the defendant made representations to the victim. Central Distributors has not produced a shred of evidence showing that any of the defendants made any false statements or omissions to Central Distributors or that Central Distributors relied on any statement or omission to its detriment. . . . In our mind, Central Distributors has failed to point to any testimony or evidence that John Nate, Jr. sold beer through Nate Beverage to the Conns with any intent to defraud Central Distributors. Although the defendants may have committed other wrongs by this scheme, nothing in the record supports Central Distributors' claim that the defendants violated RICO in any way.

Central Distributors filed a Petition for Rehearing and/or Reconsideration with the Sixth Circuit. On January 25, 1994, the Sixth Circuit denied Central Distributors' Petition for Rehearing and/or Reconsideration.

II. THE SIXTH CIRCUIT RULING THAT FRAUD CONNECTED WITH MAIL OR WIRE FRAUD MUST INVOLVE MISREPRESENTATIONS OR OMISSIONS FLOWING FROM THE DEFENDANT TO THE PLAINTIFF IS CONSISTENT WITH THE LANGUAGE OF THE WIRE FRAUD ACT AND IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS.

A. Petitioner is in error in stating there is a conflict among the circuits that have decided this issue.

Petitioner contends that interstate telephone calls made by Nate to Anheuser Busch to order Anheuser Busch products in the ordinary course of business constitutes wire fraud within the definition of RICO. To defraud within § 1341 and 1343 means to use "dishonest methods or schemes and usually signifies the deprivation of something of value by trick, deceit, chicane or overreaching". *McNally* v *United States*, 483 US 350, 358 (1987). In *McNally* the Supreme Court held that the mail fraud statute was limited in scope to the protection of property rights, which did not encompass a citizen's right to honest government. In late 1988, 18 USC § 1346 was enacted to reverse that portion of the holding in *McNally*. Under § 1346, a scheme or artifice to deprive another of the intangible right of honest services constitutes a scheme or artifice to defraud.

The scope of the mail and wire fraud statutes is broader than that of common law fraud. Nonetheless, not every use of the mails or wires in furtherance of an unlawful scheme to deprive another of property constitutes mail or wire fraud. The plaintiff must have been deceived. Misconduct not involving deception of the

plaintiff, even it if involves deception of third parties to the plaintiff's detriment is not mail or wire fraud upon which Plaintiff can predicate a RICO claim. *McEvoy Travel Bureau, Inc.* v *Heritage Travel, Inc.*, 904 F2d 786 (1st Cir) cert den, 111 SCt 536 (1990), at 792-794.

In *Walters* v *First National Bank N.A.*, 855 F2d 267 (6th Cir, 1988) cert den 489 US 1067 (1989), the Sixth Circuit held that the scheme to defraud must involve misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension. The term "scheme to defraud" connotes some degree of planning by the defendant. It is essential that the evidence show that the defendant entertained an intent to defraud. *Atlas Pile Driving Co.* v *DiCon Fin. Co.*, 886 F2d 986 (8th Cir, 1989). However, acts done inadvertently, mistakenly, or in good faith, without an intent to defraud, do not satisfy the mens rea requirement of the statute. *O'Malley* v *New York City Transit Authority*, 896 F2d 704 (2nd Cir, 1990). At a minimum, the mens rea element of the offense requires that reliance be anticipated by the defendant. *Pelletier* v *Zweifel*, 921 F2d 1465 (11th Cir) cert den 112 SCt 167 (1991).

Petitioner is incorrect in representing that the state of the law on the issue of whether a defendant must make a false statement to the person defrauded is confused among the circuits that have addressed the issue. In fact, the circuit level authority clearly supports the convergence requirement. *See e.g. United States* v *Shelton*, 848 F2d 1485 (10th Cir, 1988); *United States* v *Lew*, 875 F2d 219 (9th Cir, 1989); *United States* v *Evans*, 844 F2d 36 (2nd Cir, 1988); *McEvoy Travel* v *Heritage Travel, Inc.*, 904 F2d 786 (1st Cir, 1990); *Brandenburg* v *Seidel*, 859 F2d 1179 (4th Cir,

1988). Also well-reasoned opinions have issued in the District Court cases within the Fourth Circuit of *Mylan Laboratories, Inc.* v *Akzo, N.Z., et al*, 770 F Supp 1053 (D. MD, 1991), and *Lifschultz Fast Freight* v *Consolidated Freightways*, 805 F Supp 1277 (D.S.C. 1992). The opinion from the Sixth Circuit on the instant case is clearly built upon the foundation laid by the other circuits as well as the other Sixth Circuit opinions in *Blount Financial Services, Inc.* v *Walter E. Heller & Co.*, 819 F2d 151 (6th Cir, 1987) and *Bender* v *Southland Corp.*, 749 F2d 1205 (6th Cir, 1984).

It is true that not all circuits have addressed this issue and that there are district court decisions holding that a plaintiff who is injured as a proximate result of fraud should be able to recover regardless whether the plaintiff or the third party is the one deceived. It is clear, however, that the circuits are favoring a convergence of the injured party with the deceived as necessary to support the predicate elements of allegations of wire and mail fraud.

In support of its split in the circuits argument, Petitioner relies heavily on *Schrieber Distributing Co.* v *Serv-Well Furniture Co., Inc.*, 806 F2d 1393 (9th Cir, 1986) and represents to this Court that as a result of the *Schrieber* opinion, the Ninth Circuit has ruled that no statement to the person defrauded is necessary. However, in light of *United States* v *Lew, supra*, which relied upon other Ninth Circuit opinions issued in *United States* v *Bonallo*, 858 F2d 1427 (9th Cir, 1988), *United States* v *Mitchell*, 867 F2d 1232 (9th Cir, 1989), and *United States* v *Eggan*, 860 F2d 904 (9th Cir, 1988), the Ninth Circuit clearly stands for the proposition that an element crucial to sustaining a mail fraud

conviction is an intent to obtain money or property through deceiving the victim. Clearly, had the *Schrieber* case been argued subsequent to *Lew* and its progeny, it would not have survived in the Ninth Circuit given its subscription to the convergence requirement.

Petitioner further asserts that another reason to grant certiorari in this case is to address the effect of the *McNally* decision and the enactment of 18 USC § 1346 on the convergence theory, Petitioner's understanding and interpretation of the decision in *McNally* and the enactment of 18 USC § 1346 is, at best, misplaced.

The point of the enactment by Congress of 18 USC § 1346 was to clarify the term "scheme or artifice to defraud" to include the scheme or artifice to deprive another of the intangible right of honest services, which the Court in *McNally* abolished. However, outside the issue of tangible versus intangible, *McNally* remains good law. As the Court in *Mylan Labs* stated "there must be a convergence of the deceived and the injured . . . . This convergence of identity seems inherent in the idea of fraud as provided in the fraud statutes and defined by the Supreme Court in *McNally*." Therefore, contrary to Petitioner's assertion, 18 USC § 1346 does nothing to contraindicate the definition of fraud as provided by the Court in *McNally*.

B. Petitioner's reliance on this Court's prior decision in *Pereira* v *United States*, 347 US 1, 74 SCt 358, 98 L Ed 2d 435 (1954) is misplaced.

Petitioner's assertion that this Court's prior decision in *Pereira* suggesting that this Court would hold no direct

communication to the defrauded party is necessary to establish wire fraud or mail fraud is a total misinterpretation of the opinion delivered by the Court. If anything, *Pereira* supports the convergence principle. There is no question that in a review of the factual basis of *Pereira* that the convergence principle is satisfied.

The scheme to defraud in *Pereira* involved a perpetrator (Pereira) a co-conspirator (Brading) and a victim (Mrs. Gertrude Joyce). Pereira and Brading induced Mrs. Joyce to marry Pereira and upon so obtaining the confidence of Mrs. Joyce, and in furtherance of the scheme to defraud, induced Mrs. Joyce to provide Pereira certain amounts of her monies and assets. In so doing, Brading and Pereira used the mails in furtherance of the scheme. Therefore, the scheme to defraud involved the convergence of the deceived and the injured, thereby meeting the convergence requirement as put forth in the opinion of the Sixth Circuit in the instant case.

In the instant case, the Sixth Circuit opined that there was no representation upon which Central Distributors of Beer ever relied as a result of the alleged scheme to defraud. Therefore, Petitioner's reliance on *Pereira* in support of their position that this Court should grant certiorari is without basis in fact or law.

Respondents assert that the Circuits are clearly stating, without conflict, that to have standing as a civil RICO plaintiff, there must be a showing that the plaintiff is the target of the scheme to defraud and not some incidental second tier plaintiff who, as the result of some alleged scheme, may have suffered some indirect injury. The policy underpinning this principle is shown through the logical conclusion of Petitioner's untenable position.

If Petitioner has standing as a RICO plaintiff, then all second tier plaintiffs which would include any and all beer distributors in the state of Michigan who foreseeably could have lost sales through the conduct of Donald Conn's sale of beer to customers who, as Petitioner argues would have bought beer from those various distributors otherwise. If those second tier plaintiffs have standing as a RICO plaintiff, then why not the potential third tier of plaintiffs, those being retailers who foreseeably lost opportunity to sell beer to retail customers to whom Donald Conn allegedly sold beer, and thereby were deprived of those profits. Finally, an argument could be made also for a potential fourth tier of plaintiffs, those being the customers themselves who did not have the opportunity of purchasing beer from Donald Conn and lost savings on the retail price.

If the Sixth Circuit and this Court adopted the Petitioner's concept that a scheme to defraud involved any and all parties who potentially stood to suffer an injury for a loss of opportunity, the logic of that argument would result in an impermissible broadening of civil RICO to the point where the courts would be deluged with civil RICO complaints and the statute would be senseless.

III. PETITIONER ERRONEOUSLY ASSERTS THAT THE SIXTH CIRCUIT'S RULING THAT ELEMENTS OF WIRE FRAUD DIFFER DEPENDING UPON WHETHER THE CASE IS A CRIMINAL PROSECUTION OR A CIVIL CASE UNDER THE RICO ACT IS IN CONFLICT WITH A PRIOR DECISION OF THIS COURT.

In this Court's ruling in *Sedima S.P.R.L.* v *Imrex Company, Inc.*, 473 US 479, 105 SCt 3275, 87 L Ed 2d 346,

(1985), the scheme to defraud involved a Belgium corporation which had entered into a joint business venture with an American corporation. The plaintiff, Sedima, asserted that Imrex concocted a scheme to defraud Sedima through the presenting of inflated billing statements in order to cheat Sedima out of a portion of its proceeds through the collection of non-existent expenses.

In the Sixth Circuit opinion of *United States* v *Ames Sintering Co.*, 927 F2d 232 (6th Cir, 1990), defendant Ames Sintering Co. and two of its employees were indicted on charges of conspiring to defraud General Motors Corporation through rigging bids on parts contracts. In the instant case, the Sixth Circuit distinguished the scheme to defraud and found that Central Distributors did not produce a shred of evidence showing that any of the Defendants made any false statements or omissions to Central Distributors or that Central Distributors relied on any statement or omission to its detriment. In fact, the Sixth Circuit pointed out that the Conns were not even aware of the existence of Central Distributors until after the commencement of this action. The Sixth Circuit came to the conclusion that Central Distributors failed to produce any testimony or evidence that John Nate, Jr. sold beer through Nate Beverage to the Conns with any intent to defraud Central Distributors. If there was an illegal sale from Nate to Conn, Nate's involvement ended at that point. There was no allegation in the Complaint or Amended Complaint, nor any evidence produced that Nate benefitted from the resale of the beer. Nate's involvement, according to Central's pleading and proofs, ended with the illegal sale to Conn. As stated by the Sixth Circuit, this may be a violation of state law, but does not

establish a RICO claim. This conclusion is completely supported by the facts and common sense.

The Sixth Circuit decision in the instant case is consistent with this Court's opinion in *Sedima* and consistent with the Sixth Circuit's previous decisions, not only in *Ames Sintering*, but also in *Bender* v *Southland Corp., supra* and *Blount Financial Services, Inc.* v *Walter E. Heller & Co., supra*. The crucial distinction that Petitioner refuses to acknowledge lies in establishing a scheme to defraud wherein there must be a convergence between the deception and the victim in order to establish a nexus between predicate acts establishing the fraud and the victim so as to constitute a RICO claim. In the instant case, Petitioner's allegations establish, at best, an illegal sale of beer by Nate to Conn, which incidentally, taking the allegations in a light most favorable to Petitioner, leads to an attenuated injury of the Petitioner. There was a total absence of proof of any scheme between Nate and Conn to defraud Central. Whereas in the decisions of the other circuits, as well as this Court's decisions in *Pereira* and *Sedima*, there clearly has been, in the scheme to defraud, a convergence between the deceived and the injured party.

Alleging mail and wire fraud with nothing more, fails to establish a RICO claim. In this case, Petitioner has alleged interstate calls and deception of Anheuser Busch, Nate's wholesaler, but they have failed to show any fraudulent scheme or intent to deceive on behalf of Respondents against Petitioner, Central Distributors of Beer. That is where their RICO claim is deficient, that is where they have misconstrued the opinion of the Sixth Circuit in this case, and have misunderstood the law of the other Circuits requiring that to establish fraud rising

to the level of a RICO offense, allegations must necessarily include a convergence of the deceived and the injured. The law is and should be interpreted that a RICO claim does not exist when there, at best, exists an attenuated incidental injury occurring to a second tier plaintiff absent scienter or the mens rea sufficient to establish a scheme to defraud.

CONCLUSION

It is respectfully submitted that for all of the above reasons, Respondents assert that the opinions in this field of law emanating from the circuits are loud and clear. The issues asserted by Petitioner lack import for this Court's consideration given the Circuits' consistent opinions. Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 93-1688

In The

Supreme Court of the United States

October Term, 1993

CENTRAL DISTRIBUTORS OF BEER, INC.,

Petitioner,

v.

DONALD CONN, GLORIA CONN, JOHN NATE BEVERAGE INC., AND JOHN NATE, JR.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Central Distributors of Beer, Inc.

RESPONDENTS

Donald Conn and Gloria Conn

OTHER RESPONDENTS

John Nate Beverage, Inc., and John Nate, Jr.

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CENTRAL DISTRIBUTORS OF BEER, INC.,

Petitioner,

v.

DONALD CONN, GLORIA CONN, JOHN NATE BEVERAGE INC., AND JOHN NATE, JR.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

That the Respondents, Conn, agree with the statements of Petitioner in invoking the jurisdiction of this Court under 28 USC Section 1254(1) as set forth in the Petitioner's brief.

STATEMENT OF THE CASE

The Petitioner, Central Distributors of Beer, Inc., filed this action alleging four (4) State law claims and one (1)

claim under the Racketeering Influence and Corrupt Organizations Act, 18 USC Section 1961 et seq. ("RICO"). In its RICO claim, the Petitioner alleges that the Respondents committed mail and wire fraud by engaging in a scheme to sell beer to retailers and other consumers within the Petitioner's exclusive territory and to obtain false refunds of deposits from the Petitioner. The Respondents filed a Motion to Dismiss Action for failure to state a claim upon which relief could be granted. (Federal Rule of Civil Procedure 12 (b)(6)), which was initially granted by the District Court. Upon a Motion for Rehearing and Reconsideration, the District Court afforded the Petitioner an opportunity to amend its complaint and the Respondents again filed a Motion to Dismiss and for Summary Disposition to the amended complaint. The District Court granted summary judgment in favor of the Respondents on the Petitioner's amended RICO claim, finding that the Petitioner had failed to present evidence to support its claim that mail or wire fraud were the predicate acts to support its RICO claim. Specifically, the court found undisputed evidence that the Respondents Conn were not aware of the existence of the Petitioner before the commencement of the action, that there was no evidence that Respondent John Nate, Jr. sold beer to Respondents Conn through John Nate Beverage Company, Inc., or with any intent to defraud the Petitioner and, furthermore, that there was no evidence that Respondents Conn purchased from Respondents Nate any of the beer that was distributed in the territory of the Petitioner. Because the RICO claim was the only basis for the District Court's jurisdiction, the court dismissed the

Petitioner's remaining State law claims and the Petitioner appealed to the Sixth Circuit Court of Appeals.

The Sixth Circuit affirmed the decision of the District Court below and denied a Motion for Rehearing and Reconsideration, and it is from that decision that the Petitioner now files its Petition for Writ of Certiorari.

FACTUAL BACKGROUND OF THE CASE

The Petitioner, Central Distributors of Beer, Inc., is a wholesaler of Anheuser-Busch brands of beer. Pursuant to the Michigan Liquor Control Act and the wholesale equity agreement between the Petitioner and Anheuser-Busch, the Petitioner has an exclusive territory that includes part of Wayne County, Michigan. Under the exclusive territory agreement, the Petitioner had the exclusive distribution rights for Anheuser-Busch products to retailers in its territory. Under a similar exclusive distribution agreement with Anheuser-Busch, Defendant, John Nate Beverage, Inc., another wholesaler, had similar exclusive rights in another part of the State of Michigan. The Michigan Liquor Control act prohibits a distributor with an exclusive distribution territory from selling beer to retailers located outside its exclusive territory and permits the sale of beer only to licensed retailers. The Petitioner's complaint alleges that Respondents, Donald and Gloria Conn, purchased Anheuser-Busch products from Respondent, John Nate Beverage, Inc., between 1983 and 1989. Respondents Conn are not licensed retailers under the Michigan Liquor Control act. The Respondents Conn are then alleged to have sold the beer to retailers

and individuals in the exclusive territory of the Petitioner, out of their home in the City of Allen Park. According to the complaint, Respondent, John Nate Beverage, Inc., through Respondent, John Nate, Jr., is alleged to have sold the beer to the Respondents Conn, knowing that they intended to sell the beer in the Petitioner's territory.

The Respondents deny any such scheme to defraud Central Distributors and Respondent, Gloria Conn, denies any involvement in the sale of beer from her home. Respondent, Donald Conn, has filed an Affidavit denying any intention to defraud the Petitioner and denying any knowledge of their existence until served with this civil law suit.

The Respondents deny the allegations that Respondents Conn purchased beer directly from Respondents John Nate Beverage, Inc. Respondent, Donald Conn, never purchased beer directly from the Petitioner, and no retailer has been joined as a party defendant or an alleged co-conspirator in the alleged scheme to defraud the Petitioner. Furthermore, the Petitioner has failed to come forth with any evidence of any individual who Petitioner can establish purchased beer from respondent Donald Conn instead of from itself or a retail establishment within its territory.

REASONS FOR DENYING THE PETITION

I. THE SIXTH CIRCUIT'S RULING THAT IN ORDER TO CONSTITUTE WIRE FRAUD, THE DEFENDANT MUST MAKE A FALSE STATEMENT DIRECTLY TO THE PERSON DEFRAUDED, IS CONSISTENT WITH THE DECISIONS OF THE MAJORITY OF THE CIRCUITS.

A. There Is No Direct Conflict Among The Eight (8) Circuits That Have Addressed This Issue.

The Petitioner is mistaken when it alleges that there is no consensus among the Circuits on the issue as to whether or not the Defendant must make a false statement directly to the person defrauded. Furthermore, there is no confusion as to the state of the law. It is untrue that the First and Ninth Circuits have decided that a fraudulent statement does not have to be made directly to the person defrauded. There is very clear case law to the contrary. The case law in the Eighth and Tenth Circuits are distinguishable, and are not RICO cases. As for the Second Circuit, there is no split at the Court of Appeals level and all of the decisions are consistently in favor of the so-called convergence requirement.

B. Since 1987, No Circuit Has Ruled Contrary To The Decision Of The Sixth Circuit In This Case.

The contention of the Petitioner that the First Circuit has interpreted the RICO statute differently to the Sixth Circuit in the current case is wrong. The Petitioner relies upon *United States vs. International Term Papers*, 477 F2d, 1277, 1279 (1st Cir. 1973), which is a 1973 criminal case

involving a scheme to receive money through the mail by means of false representations. It is not a civil RICO case and, as such, is distinguishable on its facts. In any event, the statement quoted by the Respondent in its brief has not been followed in subsequent cases by the First Circuit. See *McEvoy Travel vs. Heritage Travel, Inc.*, 904 F2d 786, 794 (1st Cir. 1990).

The Petitioner's attempt to distinguish *McEvoy* in its footnote 3 is flawed. *McNally vs. United States*, 483 US 350, 97 L.Ed. 2d 292, 107 S.Ct. 2875 (1987) has not been overturned in its entirety and the convergence theory has not been struck down by Congress by virtue of 18 USC Sec. 1346.

The Petitioner also relies upon *United States vs. Wise*, 553 F2d 1173 (8th Cir. 1977) for its contention that the Eighth Circuit does not support the convergence theory. *United States vs. Wise*, is likewise distinguishable by virtue of the fact that it does not involve an alleged RICO violation and, furthermore, it placed reliance on *United States vs. Scaramuzzo*, 505 F2d 102 (9th Cir. 1974) for its contention that the alleged communication need not be directed to the victim of the fraudulent scheme. The Ninth Circuit no longer follows *United States vs. Scaramuzzo* or, for that matter, *Schreiber Distributing Company vs. Servwell Furniture Co, Inc.*, 806 F2d 1393 (9th Cir. 1986).

In recent years, the Ninth Circuit has consistently ruled in favor of the convergence theory. In *United States vs. Lew*, 875 F2d 219, 221 (9th Cir. 1989) which was approved and followed in *United States of America vs. Molinaro, Mangano and Mangano*, 11 F3d 853 (9th Cir. 1993), the court, approving of *McNally*, stated as follows:

> "The intent must be to obtain money or property from one who is deceived."

The only other Circuit which the Petitioner claims has ruled that no statement to the person defrauded is necessary is the Tenth Circuit. The Petitioner makes reference to a 1932 case, which was decided before the RICO statute had been enacted and to *United States vs. Puckett*, 692 F2d 663, 669 (10th Cir. 1982) cert denied, 459 US 1091, which, once again, was not a case specifically involving a civil RICO action. The *Puckett* case cited the *United States vs. Wise* case, that relied upon case law that is no longer being followed by the Circuit in which it was decided in. The Tenth Circuit has since approved of the convergence theory. (*United States vs. Shelton*, 848 F2d 1485, 1495 (10th Cir. 1988)).

C. Seven Circuits Have Ruled That A Statement To The Person Defrauded Is Required.

The Petitioner is incorrect when it states that only three (3) Circuits have ruled that a statement to the person defrauded is required. In fact, the First Circuit has consistently required it. (*McEvoy Travel vs. Heritage Travel, Inc.*).

The Second Circuit has consistently followed this theory beginning with *United States vs. Evans*, 844 F2d 36, 39 (2nd Cir. 1988) and discussion to the contrary has been limited to the District Court level.

The Fourth Circuit in *Brandenberg vs. Seidel*, 859 F2d 1179 (4th Cir. 1988) has supported the convergence theory.

The Sixth Circuit supported the convergence theory which followed its earlier dicta in *Bender vs. Southland*

Corp., 749 F2d 1205, 1216 (6th Cir. 1986) and *Blount Financial Service, Inc. vs. Walter E. Heller & Co.*, 819 F2d 151, 152 (6th Cir. 1987) in *Central Distributors of Beer, Inc. vs. Conn*, 5 F3d 184 (6th Cir. 1993).

The Seventh Circuit has affirmed the theory of convergence in *United States vs. Keane*, 678 FSupp 708, 711 (N.D. Ill 1987) affirmed 852 F2d 199 (7th Cir. 1988) cert denied, 490 U.S. 1084, 109 S.Ct. 2109, 104 L.Ed. 2d 670 (1989).

The Ninth Circuit has ruled consistently in favor of the convergence theory since *United States vs. Lew, et seq.*

The Tenth Circuit has ruled in favor of the convergence theory in *United States vs. Shelton.*

II. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THIS ISSUE.

The Circuits have consistently ruled in Civil RICO actions that a proper Plaintiff must be the party that is both defrauded and the victim of the false representations. There is a consistency in the decisions of the Circuit Courts in that regard and it is not an issue in controversy that requires further clarification by this Honorable Court.

CONCLUSION

For all of these reasons, the Petition for Writ of Certiorari should be denied.

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